1990

New West Federal Savings and Loan Association, a California corporation, successor-in-interest to American Savings and Loan Association, a California corporation v. John L. Margetts : Reply Brief

Utah Court of Appeals

W. Cullen Battle; Craig T. Jacobsen; Fabian & Clendenin; Attorneys for Plaintiff/Appellee.
Backman, Clark & Marsh; Ralph J. Marsh; Attorneys for Defendant-Appellant.

IN THE
COURT OF APPEALS
OF THE
STATE OF UTAH

NEW WEST FEDERAL SAVINGS AND LOAN ASSOCIATION, a California corporation, successor-in-interest to AMERICAN SAVINGS AND LOAN ASSOCIATION, a California corporation, Plaintiff-Appellee, vs. JOHN L. MARGETTS, Defendant-Appellant.	**Case No. 90-0409-CA**

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County
Honorable Kenneth Rigtrup, Judge

BACKMAN, CLARK & MARSH
Ralph J. Marsh
800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendant-Appellant

W. CULLEN BATTLE and
CRAIG T. JACOBSEN
Fabian & Clendenin
12th Floor, 215 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellee

Argument Priority: (16) Any matter not included within other categories.

IN THE
COURT OF APPEALS
OF THE
STATE OF UTAH

NEW WEST FEDERAL SAVINGS AND LOAN ASSOCIATION, a California corporation, successor-in-interest to AMERICAN SAVINGS AND LOAN ASSOCIATION, a California corporation, Plaintiff-Appellee, vs. JOHN L. MARGETTS, Defendant-Appellant.	**Case No. 90-0409-CA**

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County
Honorable Kenneth Rigtrup, Judge

BACKMAN, CLARK & MARSH
Ralph J. Marsh
800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101
Attorneys for Defendant-Appellant

W. CULLEN BATTLE and
CRAIG T. JACOBSEN
Fabian & Clendenin
12th Floor, 215 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellee

Argument Priority: (16) Any matter not included within other categories.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

page

TABLE OF AUTHORITIES - Continued:

Cases

Statutes

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this court by §78-2a-3(j), U.C.A. This is an appeal from a final judgment, dated April 23, 1990, of the Third Judicial District Court of Salt Lake County, State of Utah. Notice of Appeal was filed May 23, 1990. On July 31, 1990, this case was transferred to the Court of Appeals by the Supreme Court pursuant to §78-2-2(4), U.C.A.

ISSUES PRESENTED FOR REVIEW

POINT I

THE TOTAL AGREEMENT BETWEEN THE PARTIES IS SO AMBIGUOUS AS TO BE UNENFORCEABLE AND VOID UNLESS MARGETTS' VIEW OF THAT AGREEMENT IS ADOPTED. ONLY THAT VIEW MAKES ANY SENSE AND SHOWS A MEETING OF THE MINDS.

POINT II

MR. SNOW HAD BOTH ACTUAL AND APPARENT AUTHORITY TO ACT FOR AND BIND AMERICAN BY THE REPRESENTATIONS HE MADE AS TO THE EFFECT OF THE AGREEMENT MARGETTS SIGNED.

POINT III

THE CASES RELIED UPON BY NEW WEST IN POINT V OF ITS BRIEF DO NOT SUPPORT THE AWARD OF RENTAL VALUE. INSTEAD THEY SUPPORT MARGETTS' POSITION THAT UNJUST ENRICHMENT CANNOT BE CONSIDERED BY THE COURT AND HAS NOT BEEN ESTABLISHED BY THE EVIDENCE.

ISSUES PRESENTED FOR REVIEW - Continued:

POINT IV

NEW WEST'S FAILURE TO COMPLY WITH THE UNLAWFUL DETAINER STATUTE HAS BEEN PROPERLY RAISED BELOW AND THE JUDGMENT FOR UNLAWFUL DETAINER MUST BE REVERSED.

POINT V

THE JUDGMENT FOR ATTORNEY'S FEES FINDS NOT SUPPORT IN THE RECORD AND HAS NOT BASIS IN LAW OR FACT.

STANDARD OF APPELLATE REVIEW

I. The issue of construing several agreements together as one transaction is a question of law and no deference to the conclusion of the trial court is required. *Big Cottonwood Tanner Ditch Co. v. Salt Lake City,* 740 P.2d 1357, 1358 (Utah App. 1987).

II. The question of actual or apparent authority of an agent involves mixed questions of law and fact which "do not require the deference due to findings on questions of pure fact." *Margulies v. Upchurch,* 696 P.2d 1195, 1200 (Utah 1985). Deference is to be accorded to facts found by the lower court from disputed evidence but the legal conclusions resulting from those

STANDARD OF APPELLATE REVIEW – Continued:

facts are questions of law which are reviewed for correctness. *Bellon v. Malnar,* 808 P.2d 1089, 1092 (Utah 1991).

III. The issue of fair rental value based on unjust enrichment is a question of law to be reviewed for correctness since the underlying facts are not in dispute. Whether those facts support a conclusion that all required elements of unjust enrichment have been satisfied is a legal conclusion to be reviewed for correctness. *Grayson Roper Ltd. v. Finlinson,* 782 P.2d 467, 470 (Utah 1989).

IV. The question of New West's compliance with the Unlawful Detainer Statute is a question of law to be reviewed for correctness since all the underlying facts are not in dispute. *Asay v. Watkins,* 751 P.2d 1135 (Utah 1988).

V. Since there was no evidence introduced at trial on the question of attorney's fees, the propriety of the award of attorney's fees is entirely a question of law to be reviewed for correctness. *Commerce Financial v. Markwest Corp.,* 806 P.2d 200, 202 (Utah App. 1990).

Respectfully submitted,

BACKMAN, CLARK & MARSH

By_____
Ralph J. Marsh
Attorneys for Appellant

STATUTES AND RULES TO BE INTERPRETED

Utah Code Annotated

§78-36-3 Unlawful detainer by tenant for term less than life.

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(a) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

(i) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

(c) when he continues in possession in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due;

(d) when he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after service upon him of a three days' notice to quit; or

(e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property,

served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three days after service. Within three days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

§78-36-6 Notice to quit -- How served.

The notices required by the preceding sections may be served:

(1) by delivering a copy to the tenant personally;

(2) by sending a copy through registered or certified mail addressed to the tenant at his place of residence;

(3) if he is absent from his place of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at either place and mailing a copy to the tenant at the address of his place of residence or place of business; or

(4) if a person of suitable age or discretion cannot be found at the place of residence, then by affixing a copy in a conspicuous place on the leased property. Service upon a subtenant may be made in the same manner.

IN THE
COURT OF APPEALS
OF THE
STATE OF UTAH

NEW WEST FEDERAL SAVINGS AND LOAN ASSOCIATION, a California corporation, successor-in-interest to AMERICAN SAVINGS AND LOAN ASSOCIATION, a California corporation, Plaintiff-Appellee, vs. JOHN L. MARGETTS, Defendant-Appellant.	Case No. 90-0409-CA

APPELLANT'S REPLY BRIEF

BECAUSE of certain new matters, both factual and legal, raised in Appellee's Brief, Appellant deems it necessary to respond to and clarify those matters.

STATEMENT OF FACTS

Appellant reaffirms the statement of facts in his initial brief and makes the following clarifications or corrections to some assertions of fact made by Appellee:

1. In paragraph 6 of its Statement of Facts, New West has stated that "American Savings agreed to front the costs incurred in reaching settlement

agreements with all of the lienholders". This statement is misleading since "fronting the costs" implies that Terrace Falls would reimburse those costs later to American. That was not the intent and was not done. American simply paid whatever was negotiated by its agent, Mr. Snow, to obtain the releases from lienholders.

2. In paragraph 9 of its Statement of Facts, New West asserts that American offered Margetts a credit of $150,000 and "Margetts accepted this offer". The fact is that Margetts refused to accept this offer and did not sign the agreements until Mr. Snow presented the Twenty Percent Agreement and explained to Margetts that it would give him what he wanted, that only seven condominiums had to be sold to completely pay for his condominium and that American did not have to sign the agreement to be bound by it because American would be Terrace Falls Condominiums. (See Statement of Facts, ¶¶4-7, Appellant's Brief).

3. In paragraph 10 of its Statement of Facts, New West asserts that the "stated purpose of the Twenty Percent Agreement was to permit Margetts to participate in any windfall profits the Project developers might receive after American Savings took over the project." Besides the unbelievability of this assertion (see Appellant's Brief, pp.23-24), that is not its stated purpose. That purpose is not stated in the agreement nor did Mr. Snow state to Margetts that that was its purpose. That was only his explanation of it long after the fact when he didn't want to be caught in the cross-fire between Margetts and New West.

4. In paragraph 13 of its Statement of Facts, New West asserts that Margetts was served with a Notice to Quit by certified mail in accordance with Utah Code Ann. §§78-36-3 and 6. The evidence only shows that Margetts eventually received a copy of the notice but not that it was served by certified mail as required by §78-36-6, U.C.A. nor that it complied with §78-36-3, U.C.A. The failure to comply with the statute is crucial to New West's attempt to obtain a judgment under the unlawful detainer statute.

SUMMARY OF ARGUMENT

I. THE ENTIRE AGREEMENT BETWEEN THE PARTIES IS ONLY CLEAR AND ENFORCEABLE IF MARGETTS' VIEW OF IT PREVAILS.

New West's claim that the purchase agreement is unambiguous ignores the fact that the total agreement includes the Twenty Percent Agreement which was the inducement for the signing of the purchase agreement. New West admits those agreements are inconsistent. The total agreement is, therefore, unenforceable and void unless Margetts' view of the total agreement is adopted. Only that view makes any sense and preserves the total agreement.

II. MR. SNOW HAD BOTH ACTUAL AND APPARENT AUTHORITY TO ACT FOR AND BIND AMERICAN TO THE TOTAL AGREEMENT.

Mr. Snow was authorized by American to act for it in obtaining a release from Margetts. Whatever he did and represented in the course of obtaining that release is binding on American. If actual authority was not present, the

facts show that American placed Mr. Snow in a position where all offers and communications came through him and Margetts was justified in relying on Mr. Snow's actions and representations. American and its successor, New West, are bound by the representations Mr. Snow made to Margetts as to the effect of the agreement he was signing.

III. THE JUDGMENT FOR RENTAL VALUE IS NOT SUPPORTED BY ANY OCCUPANCY AGREEMENT NOR HAVE THE ELEMENTS OF UNJUST ENRICHMENT BEEN PLEADED OR PROVED.

A judgment for rent must be based either on an agreement to pay rent or on unjust enrichment. There was no agreement to pay rent and New West did not plead nor prove the essential elements of unjust enrichment. Most importantly, New West received a substantial benefit from Margetts' occupancy and Margetts suffered a substantial detriment in not receiving his condominium. Under those circumstances it cannot be concluded that it is inequitable for Margetts to retain any benefit he may have received by temporarily occupying the condominium.

IV. NEW WEST WAS NOT IN A POSITION TO PROCEED UNDER THE UNLAWFUL DETAINER STATUTE AND THE JUDGMENT FOR UNLAWFUL DETAINER MUST BE REVERSED.

New West attempted to take advantage of the Unlawful Detainer Statute without complying with its strict requirements. Margetts was not a tenant at will under the statute and neither he nor his wife were served with a notice to quit as required by the statute. Furthermore, his wife was not even joined in this action so any unlawful detainer by Margetts caused no loss to New West

because she still had the right of possession. At most, only nominal damages could be awarded.

V. THERE WAS NO CONTRACT, STATUTE OR EVIDENCE TO SUPPORT THE AWARD OF ATTORNEY'S FEES.

An award of attorney's fees must be supported by evidence. No evidence was submitted to the lower court. There was no statute which authorized attorney's fees and the only contract which provided for fees was not in dispute and no judgment was obtained under that contract. In fact, New West abandoned its claim under that contract. That contract, the Condominium Purchase Agreement, was only in dispute if the court held the Twenty Percent Agreement to be a part of that contract, in which event Margetts must prevail on the merits and attorney's fees should be awarded to him.

ARGUMENT

POINT I

THE TOTAL AGREEMENT BETWEEN THE PARTIES IS SO AMBIGUOUS AS TO BE UNENFORCEABLE AND VOID UNLESS MARGETTS' VIEW OF THAT AGREEMENT IS ADOPTED. ONLY THAT VIEW MAKES ANY SENSE AND SHOWS A MEETING OF THE MINDS.

New West has, in Point I of its brief, argued that the Condominium Purchase Agreement was clear and unambiguous on its face and, therefore, not subject to modification by extrinsic evidence. That argument may have

validity when applied to the Condominium Purchase Agreement itself. But that document is not the agreement between the parties that is at issue in this case and that argument ignores the reason for the entire dispute in this case. It is without dispute that Margetts had refused to sign any agreement with American until the Twenty Percent Agreement was presented to him and he was assured that American would be bound by it. The Twenty Percent Agreement was signed at the same time and as a part of the same transaction as the Condominium Purchase Agreement and it, plus Mr. Snow's explanation of it, was the inducement for Margetts to sign the Condominium Purchase Agreement. Therefore, the Twenty Percent Agreement was a part of the total agreement between the parties and all of these documents must be construed together as one agreement. *Bullfrog Marina Inc. v. Lentz,* 28 U.2d 261, 501 P.2d 266, 270-1 (1972), and the other cases cited on page 15 of Appellant's Brief.

When these documents are construed together as one agreement, even New West admits that they are inconsistent (see Appellee's Brief, p. 10, lines 18-19) and, therefore, ambiguous. Resort to extrinsic evidence is necessary to resolve the ambiguity and that requires the court to consider the statements made by Mr. Snow to Margetts to induce him to sign the agreements. Those statements, themselves, are admitted by New West to be inconsistent with the agreements (see Appellee's Brief, p. 21, lines 4-6) but only those statements explain why Margetts finally signed the documents after having refused to do so for so long. Only when Mr. Snow told Margetts that he would get what he wanted by such an agreement (the condominium he had bargained for), that

American "will be Terrace Falls Condominiums" and be bound by the agreement and that "they only have to sell seven condominiums and your condominium will be paid for" (R. 239, pp. 212-4)--only then, did Margetts sign the documents.

Margetts' action in finally signing those documents, after refusing to do so for so long, and the inconsistencies in the documents and the statements only make sense if American was a party to the total agreement and was bound by it. Otherwise, the total agreement is so inconsistent and ambiguous as to be unenforceable and, therefore, void. *Pingree v. Continental Group of Utah, Inc.,* 558 P.2d 1317, 1321 (Utah 1976); *Valcarce v. Bitters,* 12 U.2d 61, 362 P.2d 427 (1961). Preservation and enforceability of the total agreement require that Margetts' view of the transaction be adopted. That requires that he be given credit for twenty percent of the sales price of all condominiums sold against the purchase price of his unit.

POINT II

MR. SNOW HAD BOTH ACTUAL AND APPARENT AUTHORITY TO ACT FOR AND BIND AMERICAN BY THE REPRESENTATIONS HE MADE AS TO THE EFFECT OF THE AGREEMENT MARGETTS SIGNED.

In arguing that Mr. Snow had neither actual nor apparent authority to bind American to the Twenty Percent Agreement, New West, in Point II of its brief, has asserted that Margetts failed to show one fact suggesting that American gave Margetts reason to believe that Mr. Snow was its agent. It has further implied that Margetts had the responsibility to ascertain whether Mr.

Snow had authority to act for American. The fact is that Mr. Snow was American's actual agent for the purpose of obtaining releases of the liens against the Terrace Falls project and, therefore, those assertions are irrelevant. By paragraph 3 of the Deed in Lieu of Foreclosure Agreement, Terrace Falls and American agreed to cooperate in obtaining releases of liens against the property. American further agreed to pay the amounts required to obtain those releases (¶4.E of Deed in Lieu of Foreclosure Agreement). That required that American authorize the amount to be paid, since Terrace Falls was not given a blank check. Mr. Snow was directed to negotiate the settlement with Margetts and each proposal he made was authorized by American. Mr. Snow was paid for his services by American, which is evidence of actual authority. American's admitted agents communicated directly with Mr. Snow as to what they were willing to do to obtain Margetts' release. They authorized him to make each offer and to prepare the required documents. Mr. Snow was American's actual agent and acted as its attorney. It is irrelevant that American may have been advised by other attorneys or that Mr. Snow may also have represented other parties. American gave Mr. Snow authority to act for it and it is, therefore, bound by anything he did in carrying out American's directions to obtain a release from Margetts.

> Whenever the performance of certain business is confided to an agent, such authority carries with it, by implication, authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized. *Bowen v. Olsen,* 576 P.2d 862, 864 (Utah 1978).

This authority applies even to acts of the agent which were not authorized by the principal so long as they are within the scope of the agent's employment. See *Kline v. Multi-Media Cablevision, Inc.,* 233 Kan. 988, 666 P.2d 711 (1983); *Ficke v. Alaska Airlines, Inc.*, 524 P.2d 271, 275 (Ala. 1974). Therefore, what Margetts knew about that authority and the facts which relate only to the question of apparent authority are superfluous. Mr. Snow had actual authority to act for American and it is bound by his representations made to Margetts in obtaining from him the release that he had been authorized to obtain.

Those superfluous facts are, however, sufficient to establish that Mr. Snow had apparent authority, in addition to his actual authority, to act for and to bind American. In *Forsyth v. Pendleton,* 617 P.2d 358, 360 (Utah 1980), the referral by a seller to her attorney of a letter written to her by the buyers was held to be sufficient to clothe the attorney with apparent authority to act for the seller. *Walker Bank & Trust Co. v. Jones,* 672 P.2d 73, 74 (Utah 1983), also upheld the principle of apparent authority and stated the rule of law as follows:

> Apparent authority exists: "[W]here a person has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first person . . . ." *Wynn v. McMahon Ford Co.,* 414 S.W.2d 330, 336 (Mo. App. 1967).

From the very first meeting of the parties every statement on behalf of American, every offer made by American, every document relating to the transaction and every communication back to American from Margetts was made by or passed through Mr. Snow. This was true even when American's

admitted agent, Mr. Lee Stevens, was present. Mr. Snow spoke for him and relayed Margetts' responses back to him. New West's assertion, on page 18 of its brief, that "Margetts failed to establish one fact to suggest that American Savings ever gave Margetts any reason to believe that Mr. Snow was an agent for American Savings", flies in the face of all of the facts recited on pages 16-17 and 21-23 of Appellant's Brief. American clearly "created such an appearance of things that it caused" Margetts "reasonably and prudently to believe that "Mr. Snow had "the power to act on behalf of" American. New West is, therefore, bound by the acts of its predecessor's agent, including the representations made by that agent as to the effect of the total agreement.

POINT III

THE CASES RELIED UPON BY NEW WEST IN POINT V OF ITS BRIEF DO NOT SUPPORT THE AWARD OF RENTAL VALUE. INSTEAD THEY SUPPORT MARGETTS' POSITION THAT UNJUST ENRICHMENT CANNOT BE CONSIDERED BY THE COURT AND HAS NOT BEEN ESTABLISHED BY THE EVIDENCE.

New West admits there was no contract to pay rent between Margetts and American. Its argument in favor of the award of rental value is now based on cases involving the forfeiture of real property sales contracts or unjust enrichment. New West did not make any such claims in its pleadings nor at the trial and the lower court did not make any findings which would support such claims. New West has cited *Soffe v. Ridd,* 659 P.2d 1082 (Utah 1983), and *Abrams v. Financial Service Co.,* 13 U.2d 343, 374 P.2d 309 (1962), as support

for this award. These cases both involve claims, based on unconscionable forfeiture, for the return of payments made by defaulting buyers after the termination of their contracts, in which rental value is considered as one element of the seller's actual damages. Those cases have no application here. *Marshall v. Bare,* 107 Idaho 201, 687 P.2d 591 (1984), also cited by New West, involves a home purchase contract which was actually closed and performed. Rental value for the use of the home prior to closing was not allowed in that case. The opinion, by way of dictum, would have allowed rental value in the case of disaffirmance of the contract by the buyer. That, of course, is not the case here where Margetts was attempting to enforce the agreement to obtain the condominium and the question before the court was what constituted that agreement. New West's final case is *Knight v. Post,* 748 P.2d 1097 (Utah 1988), which held that unjust enrichment did not apply just because a benefit was conferred upon a party in the absence of some misleading act by that party. The court, at 1099, quoted from *Commercial Fixtures and Furnishings v. Adams,* 564 P.2d 773, 774 (Utah 1977):

> There must be some misleading act, request for services, or the like, to support such an action. Mere failure of performance by one of the contracting parties does not give rise to a right of restitution.

There is no finding in this case of a misleading act, request for services, or the like, on the part of Margetts, nor any evidence from which such a finding could be made. Furthermore, this court has held that unjust enrichment and

inequitable forfeiture could not be considered by the court when those issues had not been properly raised in the pleadings nor at trial. *Weaver v. Bolinder,* Case No. 890230-CA (Utah App. 1990, unpublished opinion). Those questions were not raised and considered by the lower court and should not be considered here. *Drummond v. Union Pacific R.R.,* 111 Utah 289, 301, 177 P.2d 903, 909 (1947).

POINT IV

NEW WEST'S FAILURE TO COMPLY WITH THE UNLAWFUL DETAINER STATUTE HAS BEEN PROPERLY RAISED BELOW AND THE JUDGMENT FOR UNLAWFUL DETAINER MUST BE REVERSED.

New West has claimed, in Point VI of its brief, that compliance with the Unlawful Detainer Statute was not properly raised below. This assertion is surprising in view of the fact that New West specifically sought relief for unlawful detainer in its complaint and the allegations of that complaint were denied in Margetts' answer. That placed this issue of compliance with the Unlawful Detainer Statute directly before the court and was the basis of the New West's entire case, since it abandoned its alternative claim for performance of the agreement (R.538, p.154; R.539, p.334). The lower court could not properly have granted a judgment in favor of New West without considering its compliance with the Unlawful Detainer Statute under which it sought relief.

The assertion, on page 28 of Appellee's Brief, that Margetts admitted to having been properly served with a Notice to Quit is also not true. Margetts admitted to having received a notice to quit but denied all other allegations with respect thereto (Answer, 11, R. 27-51). That constitutes a denial rather than an admission that the Notice to Quit was properly served as required by the statute. Strict compliance with that statute is the essence of an unlawful detainer action and the burden is on New West to prove that it has fully complied. That applies to the form of the notice, *American Holding Co. v. Hanson,* 23 U.2d 432, 464 P.2d 592 (1970), as well as to the service of the notice, *Carstensen v. Hansen,* 107 Utah 234, 152 P.2d 954 (1944). In *Carstensen,* the mailing of a notice to quit was held to be insufficient because it did not comply with the statute. The court stated, at 955:

> There could be no need to detail certain explicit methods of service if any method will do. . . . "Under statutes like this, it is not the fact that the party to be notified has actual knowledge of the fact, but it is proof that it has been conveyed to him in the prescribed method, that gives right of action. . . . The statutory method, once broken through, would open wide the gates for vicious precedents, which rapidly multiply, and too often, in the end, practically nullify the will of the legislature." [quoting *Hyde v. Goldsby,* 25 Mo.App. 29]

Since the decision in that case, the statute has been amended to allow service of the notice by registered or certified mail, §78-36-6(2), U.C.A., but not by regular mail. New West has not met its burden of proof to show that it is entitled to proceed under the Unlawful Detainer Statute. Service by regular

mail and actual notice by any method, other than those prescribed by the statute, is simply not sufficient to place one in unlawful detainer. Other remedies were available to New West to obtain possession of the property without the necessity of following the strict requirements of the Unlawful Detainer Statute, but if it wants the benefits of the summary procedure, it must follow the steps outlined therein. *American Holding Co., supra* at 593-5 (concurring opinion).

Likewise, New West's failure to serve Mrs. Margetts with a notice to quit is fatal to its claim for damages for unlawful detainer. It labels this a "strange assertion" and claims that the "unlawful detainer statute does not require that all occupants be personally handed a copy of the Notice to Quit." (Brief of Appellee, p.28). The statute does require that the notice be served in one of the four ways listed in §78-36-6, U.C.A., one of which is handing the notice to the tenant personally. Mrs. Margetts was not served with a notice at all, let alone in one of the way prescribed by the statute. This same situation arose in *Perkins v. Spencer,* 121 Utah 468, 243 P.2d 446, 449 (1952), in which the wife was served but the husband was not. The court held:

> Unlawful detainer, being a summary procedure, the statute must be strictly complied with in order to enforce the obligations imposed by it. The trial court correctly ruled that the action for unlawful detainer could not be maintained against Mr. Perkins . . . .
>
> . . . . So long as he remained in possession, it is difficult to see how the Spencers could be damaged by the fact that Mrs. Perkins remained there. Even if she had moved, Spencers would have had no right to possession of the premises as against Mr. Perkins. They, therefore,

> suffered no actual damage. In *Forrester v. Cook,* 77 Utah 137, 292 P. 206, 211, we held that "The damages which may be recovered in an action such as this one (unlawful detainer) are measured by the rule that they must be the natural and proximate consequences of the acts complained of and nothing more." Nominal damages to vindicate their right to possession against her is all that could properly by awarded.

The court in Perkins came to this conclusion even though Mr. Perkins was working in another county and may not have been actually residing in the home at the time of service on Mrs. Perkins. Because there was no proof that he had abandoned the home or that the marriage was not intact, it was presumed that Mr. Perkins was occupying the home. The Margetts case is, therefore, a stronger one for holding that no more than nominal damages could be recovered. Furthermore, even if Mrs. Margetts had been properly served with the notice, she was not joined as a party to the action so any judgment could not be effective against her. New West has not suffered any damages as a result of Mr. Margetts' occupancy of the property and the judgment for $21,600 for unlawful detainer must be reversed.

In addition to New West's problems with failure to properly serve either of the Margetts with a notice to quit, it has not shown how it is entitled to proceed under the Unlawful Detainer Statute at all. As pointed out in Appellant's Brief, pp.30-31, New West has attempted to proceed under §78-36-3(1), U.C.A., but it is not entitled to do so because there was no contract letting the property to Margetts for a "specified term or period", as required by subparagraph (a), nor any lease of the property for "an indefinite time with

monthly or other periodic rent reserved", as required by subparagraph (b), of §78-36-3(1). Since the clause having to do with tenancies at will is a subdivision of subparagraph (b), there must have been a lease of the property "for an indefinite time with monthly or other periodic rent reserved" before the subdivision on tenancies at will applies. Otherwise, that subdivision would have been listed by itself as subparagraph (c), or some other letter designation. This does not leave New West without a remedy since it always had the non-summary remedies that existed at common law prior to and after the adoption of the Unlawful Detainer Statute. *American Holding Co., supra* at 593-5 (concurring opinion).

New West has suggested, by way of footnote on page 27 of its brief, that the court could rule that Margetts was in unlawful detainer under §78-36 3(1)(e), U.C.A. That provision requires the service of a notice giving the tenant the alternatives of performing, after default, a condition or covenant of the lease under which the property is held or of surrendering the property. That provision does not apply in this case since there was no lease or agreement under which the property was held and no alternative to perform or surrender was given in the notice. That such an alternative must be given as one of the strict requirements of the statute was the holding of *American Holding Co., supra,* at 592, with respect to the similar alternative notice required by §78-36-3(c).

New West was simply not in a position to sue under the Unlawful Detainer Statute. The judgment for unlawful detainer must be reversed.

POINT V

THE JUDGMENT FOR ATTORNEY'S FEES FINDS NO SUPPORT IN THE RECORD AND HAS NO BASIS IN LAW OR FACT.

New West has again argued, on page 28 of its brief, that the issue of attorney's fees was not raised in the lower court because, "at trial, Margetts' counsel requested that a special hearing be scheduled where the prevailing party would present attorney's fees." How that conclusion follows from the stated premise is difficult to understand. Yes, Margetts' counsel did suggest that attorney's fees be considered at a separate hearing but no such hearing was held and no evidence as to attorney's fees was ever presented. Since New West was the prevailing party, the burden was on it to schedule such a hearing and to present its evidence as to fees. There was nothing upon which the court could make a determination as to reasonableness of fees. See *Commerce Financial v. Markwest Corp.,* 806 P.2d 200 (Utah App. 1990), in which the court stated, at 204:

> . . . a party seeking attorney fees must support its claim in the trial court with evidence of their amount and reasonableness.
>
> . . . .
>
> . . . . Since C.F. failed completely in its attorney fee proof, we conclude that, on the evidence presented, the trial court did not err in denying attorney fees to C.F.

That case further held that if the action involved several claims, some of which were based on contract providing for fees and some of which were not, the failure to apportion the fees would alone be sufficient basis for the trial court's denial of attorney's fees. That principle is also involved in this case since a portion of New West's claim was based on a contract, which it abandoned (see Appellant's Brief, pp.33-34), and a portion was based on an allegation of unlawful detainer. The failure to apportion the fees means that there could be no determination as to what amount applied to the successful claim. Without that determination the judgment cannot stand.

It has been adequately demonstrated in Appellant's Brief, pp.33-35, that New West did not obtain any judgment based on a claim or dispute under an agreement which provided for attorney's fees. New West has labeled this a "truly puzzling" and "bizarre" assertion. Appellee's Brief, p.29. New West is, of course, ignoring its abandonment of any claim under the Condominium Purchase Agreement and that it was successful only in obtaining a judgment for unlawful detainer, which had nothing to do with that agreement. It is also ignoring the fact that its claimed fees must be apportioned to the matters on which it prevailed and as to the portion of the case based on a contract or statute providing for fees, as required by *Commerce Financial, supra.* It is further ignoring the fact that fees cannot be awarded under such a contract when the dispute does not relate to a breach or dispute under the contract. *Grahn v. Gregory,* 800 P.2d 320, 329 (Utah App. 1990). And, finally, it is ignoring the fact that the dispute in this case is not under the Condominium Purchase Agreement but is under the total agreement, including the Twenty

Percent Agreement. In fact, since New West claims it is not bound by the Twenty Percent Agreement so the entire dispute is really over whether or not the Twenty Percent Agreement applies. It would, therefore, be totally inconsistent to hold that the Twenty Percent Agreement does not apply and then award attorney's fees under a separate agreement that is not in dispute. Conversely, if fees are to be awarded under the Condominium Purchase Agreement, because there is a dispute under that agreement, then the Twenty Percent Agreement must be a part of that agreement since that is the basis of the entire dispute. It would follow that Margetts must prevail on its arguments in Points I and II, above, and the award of attorney's fees must be made to Margetts. That, of course, is what the court ought to order in this case but, short of that, the judgment for attorney's fees in favor of New West cannot stand.

CONCLUSION

The dispute in this case is over the entire agreement between the parties, which includes the Twenty Percent Agreement, which was signed at the same time and as a part of the entire transaction and was the inducement for the signing of the other documents. The inconsistencies and ambiguities among those documents allow the consideration of extrinsic evidence to interpret them and require that the entire agreement be held unenforceable and void unless Margetts' view of those documents, as represented to him by Mr. Snow, be adopted. That is the only view that makes any sense under the circumstances.

Mr. Snow was authorized directly by American to negotiate for a release from Margetts and, therefore, had actual authority to bind American by his

actions and representations in obtaining that release. Furthermore, by placing Mr. Snow in a position to speak for it and making all communications to Margetts through Mr. Snow, American clothed Mr. Snow with apparent authority to act for and bind it and Margetts was justified in relying on the statements made by Mr. Snow.

There was no occupancy agreement upon which the court could base its award of rental value and unjust enrichment was not raised by New West in its pleadings nor at the trial. The essential elements of unjust enrichment have not been established. In particular, New West has failed to show that it was inequitable for Margetts to retain the benefit of occupancy of the condominium, especially in light of the fact that New West retained the condominium that Margetts had paid for and did not receive.

Instead of pursuing one of the normal remedies available to it to obtain possession of the condominium, New West attempted to utilize the summary procedures of the Unlawful Detainer Statute but without complying with the strict requirements of that statute. The award of damages under that statute was, therefore, improper and must be reversed.

The judgment for attorney's fees must also be reversed because there is no statute or contract which authorizes such an award and there was no evidence before the court upon which an award of fees could be based. The only possible justification for an award of attorney's fees would require the court to hold that the Twenty Percent Agreement, the subject of the dispute in this case, was a part of the Condominium Purchase Agreement which authorizes an award of fees and, therefore, Margetts' view of the whole

agreement would be adopted and judgment must be entered in his favor on the merits as well as to attorney's fees.

The entire judgment should be reversed and judgment entered in favor of Margetts either rescinding the transaction and reinstating his lien or awarding him ownership of the condominium, or damages, and his costs and fees. In any event, the judgment in favor of New West must be reversed.

Respectfully submitted,
BACKMAN, CLARK & MARSH

By _____
Ralph J. Marsh
Attorneys for Appellant

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was mailed, postage prepaid, on the 17th day of June, 1991, to the following:

W. CULLEN BATTLE and
CRAIG T. JACOBSEN
Fabian and Clendenin
12th Floor, 215 South State Street
Salt Lake City, Utah 84111
Attorneys for Appellee

_____